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83-1114

No.

In The
Supreme Court of the United States

OCTOBER TERM: 1983

G. Harold KING, Jr. Appellant
Petitioner

v.

FIDELITY NATIONAL BANK OF BATON ROUGE,
Appellee
Defendant

On Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

APPENDIX OF
G. HAROLD KING, Jr.

Respectfully submitted
BY ATTORNEY
FRANZ JOSEPH BADDOCK
P.O. Box 3573
Baton Rouge, Louisiana
70821
(Tel.: (504) 343-9194)

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UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF LOUISIANA

IN RE.....CASE NUMBER 81-00329

G. HAROLD KING, JR. AND
SHIRLEY G. KING

INVOLUNTARY PETITION UNDER CHAPTER 7

1. Petitioner Fidelity National Bank of Baton Rouge is a creditor of G. Harold King, Jr., and Shirley G. King (sometimes hereinafter referred to as "Debtors"), and is the holder of claims against G. Harold King, Jr., and Shirley G. King that is not contingent as to liability, which claim exceeds $5,000.00 more than the value of any lien on the property of the Debtors securing claims held by petitioner.

2. The nature and amount of petitioner's claim is as follows: It is the holder of claims against the Debtors for the sum of $64,000.00, more or less, which claims are unsecured.

3. The Debtors have had their principal domicile and residence within this district for the 180 days immediately preceding the filing of this petition.

4. The Debtors have had their principal domicile and residence within this district for a longer portion of the 180 days immediately preceding the filing of this petition than they have their domicile and residence in any other district.

5. The Debtors owe debts of more than $5,000.00 and are not farmers, and may be Debtors under Chapter 7 of the Bankruptcy Code.

6. The Debtors are generally not paying their debts as such debts become due.

7. All of the creditors of G. Harold King, Jr., and Shirley G. King computed in the manner specified in 11 U.S.C. 303(b)(2), are less than twelve (12) in number.

WHEREFORE, petitioner prays that this Court enter an order for relief under Chapter 7 of Title 11 of the United States Code against G. Harold King, Jr., and Shirley G. King.

By Attorneys,
KANTROW, SPAHT, WEAVER & WALTER

By: /s/ David S. Rubin

David S. Rubin
P.O. Box 2997
Baton Rouge, Louisiana 70821
Telephone (504) 383-6703

STATE OF LOUISIANA
PARISH OF EAST BATON ROUGE

BEFORE ME, the undersigned Notary Public, personally came and appeared:

JAMES R. AUSTIN

who, after being duly sworn did dispose that,

He is an officer of Fidelity National Bank of Baton Rouge, the petitioner in the foregoing petition, and that the statements contained therein are true according to the best of his knowledge, information and belief.

James R. Austin

SWORN TO AND SUBSCRIBED before me, this 24th day of July, 1981.

Notary Public

PLEASE SERVE DEBTORS
2041 W. Magna Carta
Baton Rouge, Louisiana 70816

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF LOUISIANA

IN RE

G. HAROLD KING, JR. AND
SHIRLEY G. KING CASE NUMBER 81-00329

ANSWER OF G. HAROLD KING, JR.
AND SHIRLEY G. KING

REQUEST AND PRAYER OF G. HAROLD KING, JR.,
AND SHIRLEY G. KING
FOR TRIAL BY JURY

G. HAROLD KING, JR., and SHIRLEY G. KING, under reservation of 1) all of their rights under any pending and future Appeal, and 2) all of their rights under any and all Motions previously filed by them herein, and 3) all of their rights under any and all Responses or Oppositions to pleadings filed by the Fidelity National Bank, answer a) the original petition filed by the Fidelity National Bank augmented by Affidavit of the latter filed herein, and b) the petitions in intervention, and further, request and pray for trial by jury.

FIRST: ALLEGATIONS ADMITTED

G. HAROLD KING, JR., and SHIRLEY G. KING admit they are residents of, and domiciled in, the Middle District of Louisiana, and admit they are not farmers.

SECOND: ALLEGATIONS DENIED

G. HAROLD KING, JR., and SHIRLEY G. KING deny they are indebted unto the Fidelity National Bank; deny they are indebted unto the intervening petitioners; deny that any claims of the Fidelity National Bank exceed the value of any lien on their property securing such claims, by $5,000.00 or more; deny that the Fidelity National Bank holds unsecured claims against them for the sum of $64,000.00 more or less; and deny that they are generally

not paying their debts as such debts become due—further alleging that they have been handicapped in paying their debts because of the actions of the Fidelity National Bank—which denials and allegations are particularized herein as follows:

COUNT I

ON THE ALLEGATIONS OF G. HAROLD KING, JR.

1. King Lumber Industries, Inc. had, for many years, its offices in the bank building of the Fidelity National Bank.

2. The law firm of the bank was also the law firm of King Lumber Industries, Inc.

3. From its inception as a corporation, a senior member of this law firm would act in the capacity of Secretary or Assistant Secretary, of King Lumber Industries, Inc.

4. At times pertinent, the Fidelity National Bank would advance funds to King Lumber Industries in the aggregate amount of $500,000.00 more or less.

5. Such funds were advanced largely on an unsecured basis, save and except on the personal endorsement of the late G. Harold King, Sr.

6. That save and except for such endorsement, the Fidelity National Bank, to the best of appearer's knowledge, information, and belief, had neither 1) any security over the accounts receivable of King Lumber Industries, Inc., nor 2) any security over the real estate owned by that corporation.

7. That at all times pertinent, the operations of King Lumber Industries, Inc. were financed largely and primarily by the Fidelity National Bank.

COUNT II

ON THE ALLEGATIONS OF G. HAROLD KING, JR.

1. At times pertinent, the Fidelity National Bank advanced funds to I.H. Rubenstein, Inc., in an amount which, according to the best of appearer's knowledge,

information, and belief, exceeded the amounts advanced by the same bank to King Lumber Industries, Inc.

2. From time to time, Members of the Boards of Directors of both King Lumber Industries, Inc. and the Fidelity National Bank, were also Members of the Board of Directors of I.H. Rubenstein, Inc.

COUNT III

ON THE ALLEGATIONS OF G. HAROLD KING, JR.

1. In 1974 I.H. Rubenstein, Inc. (or "I.H. Rubenstein & Sons, Inc." as it was referred to) entered into an agreement with Capital Investment, Inc. and Louisiana Equity Capital, involving a loan from the latters in the approximate amount of $500,000.00.

2. As of February 1979, there was a balance due on this loan, by I.H. Rubenstein, Inc., in the approximate amount of $225,000.00 plus accrued interest.

3. Capital Investment, Inc. and Louisiana Equity Capital offered to sell this loan and the note representing same, to King Lumber Industries, Inc. at a discount of approximately $30,000.00.

4. Said loan was purchased by King Lumber Industries, Inc., through a transaction whereby:

a) The Fidelity National Bank advanced approximately $30,000.00 of funds, so that this transaction could be consummated.

b) King Lumber Industries, Inc. supplied approximately $10,000.00 pertaining thereto, netting thus about $30,000.00, and

c) King Lumber Industries, Inc. executed two (2) notes to the respective orders of Capital Investment, Inc. and Louisiana Equity Capital, in the combined amount of approximately $165,000.00.

5. I.H. Rubenstein, Inc. subsequently filed for protection under the Bankruptcy Act and/or Bankruptcy Code, and thus, King Lumber Industries, Inc. suffered an extensive loss as a result of this transaction.

COUNT IV

ON THE ALLEGATIONS OF G. HAROLD KING, JR.

1. On or about December of 1978, King Lumber Industries, Inc. purchased a note of Jeshep's, Inc. from I.H. Rubenstein, Inc., for the approximate amount of $200,000.00.

2. In connection with this transaction, I.H. Rubenstein, Inc. liquidated a $50,000.00 note wherein it was the maker thereof, and the $50,000.00 was re-invested into the business of King Lumber Industries, Inc.

3. Jeshep's, Inc. subsequently filed for protection under the Bankruptcy Act and/or Bankruptcy Code, and thus, King Lumber Industries, Inc. suffered an extensive loss as a result of this transaction.

COUNT V

ON THE ALLEGATIONS OF G. HAROLD KING, JR.

1. Prior to March 6, 1980, and to the best of appearer's knowledge, information, and belief, appearer G. HAROLD KING, JR. had never endorsed any obligation of King Lumber Industries, Inc. to the Fidelity National Bank, and also, prior to the same date, the Fidelity National Bank had never held nor requested collateral security re any obligation of King Lumber Industries, Inc., save and except the personal endorsement of appearer's late father, G. Harold King, Sr.

2. That at all times pertinent, and from time to time, King Lumber Industries, Inc. supplied financial reports and data to the Fidelity National Bank, whereby the latter had full knowledge of the financial condition of the former.

3. On or about March 6, 1980 King Lumber Industries, Inc., had approximately $500,000.00 of unsecured trade creditors, as well as obligations with banks other than the Fidelity National.

3. In what appears as an abrupt reversal of policy or practice, the Fidelity National bank demanded a Collateral Mortgage and other security, in reference to prior

obligations of King Lumber Industries, Inc., and irrespective of the fact that no fresh advance of capital was to be given by the bank.

4. Appearer avers that he truly believes that had either Victor Sachse or Hopkins Breazeale, Jr. been alive at the time, that neither would have condoned the request of the bank, nor permitted execution thereof, but that both of these eminent Attorneys had died in 1979, thereby leaving a void that your Appearer found it difficult to fill.

5. Appearer protested and protested emphatically to the said Cecil D. Spillman, that execution of such Collateral Mortgage and other Security (especially since the bank was not advancing any fresh funds) would be unfair to the mass of trade creditors of King Lumber Industries, Inc. and to the other financial institutions.

6. Appearer specifically avers that all of his protests were to no avail, and that the Fidelity National Bank demanded execution of such Security.

7. APPEARER SPECIFICALLY AVERS THAT THE COLLATERAL MORTGAGE DATED MARCH 6, 1980 AND OF RECORD HEREIN, WAS NOT AND HAS NEVER BEEN, AN ACT EXECUTED THROUGH THE FREE WILL OF APPEARER.

8. Further, Appearer specifically alleges that had he refused to carry out the request of said bank, as outrageous as it appeared to him, that Appearer was fearful that perhaps other actions could be taken by the bank which would further endanger the rights of the trade creditors and other financial institutions—and thereby augment a potentially greater loss, in their behalf.

COUNT VI

ON THE ALLEGATIONS OF G. HAROLD KING, JR.

1. The $250,000.00 Note of King Lumber Industries, Inc., dated March 7, 1980, did not represent any fresh advance of funds by the bank to the Maker, but allegedly

represented advances made prior to the execution of the Collateral Mortgage.

2. Appearer specifically alleges that his signature on the back of this Note, may not in law constitute a personal endorsement of Appearer, since it appears underneath the designation of KING LUMBER INDUSTRIES, INC.

3. The $23,529.44 Note of King Lumber Industries, Inc., dated June 5, 1980, did not represent any fresh advance of funds by the bank to the Maker. In fact, such note never represented any advance of funds to the Maker, within the knowledge of the bank. THIS NOTE WAS DEMANDED BY THE BANK TO REIMBURSE THE BANK FOR THE $20,000.00 ADVANCED TOWARDS CONSUMMATION AND PURCHASE OF THE I.H. RUBENSTEIN, INC. NOTE—which transaction is referred to in COUNT III herein.

King Lumber Industries, Inc. was neither Maker nor endorser on the $20,000.00 obligation, and the $23,529.44 amount represented the prior advance of $20,000.00 plus interest.

4. The $200,000.00 Note of King Lumber Industries, Inc., dated June 16, 1980 did not represent any fresh advance of funds to the Maker, but allegedly represented deposits or funds advanced prior to the execution of the Collateral Mortgage.

Appearer specifically alleges that his signature on the back of this Note, may not in law constitute a personal endorsement of Appearer, since it appears beneath the designation of KING LUMBER INDUSTRIES, INC.

5. The $60,000.00 (specifically $60,912.33) Note of G. Harold King, III dated May 14, 1980 represented neither any advance of funds to King Lumber Industries, Inc., nor to Appearer. This loan was for purchase of stock in the former.

6. The $12,000.00 Note of Appearer dated January 30, 1981, did not represent any fresh advance of funds by the bank.

7. ALL OF THESE NOTES SHOW ON THEIR FACE THAT THEY ARE SECURED RATHER THAN UNSECURED OBLIGATIONS.

8. In particular reference to the $60,912.33 Note, Appearer believes that the bank released and discharged the Maker of this Note, prior to the time that its Affidavit was filed herein, showing it as a fully viable obligation.

9. In particular reference to ALL Notes held by the Fidelity National Bank and petitioners in intervention, whereby G. HAROLD KING, JR., as an individual and as oposed to being President of King Lumber Industries, Inc., is deemed to have endorsed notes, and insofar only as this Court deems certain signatures of Appearer as constituting, in law, the personal endorsement of Appearer, the latter specifically affirms that 1) at no time was your Appearer requested to obligate the legal community existing between Appearer and his wife, Shirley G. King, and 2) at no time did your Appearer have the intention of binding such estate.

COUNT VII

ON THE ALLEGATIONS OF G. HAROLD KING, JR.

1. The Collateral Mortgage dated March 6, 1980 became a weapon of intimidation and harassment in the hands of the Fidelity National Bank, and such intimidation and harassment was of the same force and effect on your Appearer as though the Fidelity National Bank had pointed a loaded weapon.

2. The Fidelity National Bank, primarily through Cecil D. Spillman, made repeated telephone calls to the home of your Appearer, to such a degree that the life of your Appearer and his wife were rendered unbearable.

3. These calls and other harassment were of such intensity that on or about July of 1980, your Appearer (against his better judgment) authorized the expenditure of approximately $5,000.00 of much needed funds by King Lumber Industries, Inc., in an attempt to obtain a loan commitment from another source, so that all amounts

allegedly due under the Collateral Mortgage, could be paid.

4. The Collateral Mortgage covered three (3) parcels of real estate owned by King Lumber Industries, Inc., two (2) of the parcels being in East Baton Rouge Parish, and one (1) being in Livingston Parish.

5. ONE OF THE PARCELS IN EAST BATON ROUGE PARISH CONSTITUTED THE HOME OCCUPIED BY APPEARER'S LATE FATHER, G. HAROLD KING, SR., and this fact was well within the knowledge of the Fidelity National Bank.

6. Thus, Appearer was at all times pertinent at the mercy of Fidelity National Bank, in that NOT to abide by all the wishes of the bank might have endangered foreclosure on the parcel occupied by Appearer's late father, WITH THE KNOWLEDGE THAT SUCH FORECLOSURE COULD POSSIBLY KILL THE LATTER!

7. Being thus at the mercy of the said bank, your Appearer was forced, against his better judgment, to condone sale of the other parcel in East Baton Rouge Parish, under the basis where substantially all of the proceeds of sale went to satisfy the Fidelity National Bank, and NONE went to satisfy either the trade creditors or other financial institutions.

8. Again at the mercy of said bank, your Appearer was forced, against his better judgment, to condone sale of the parcel in East Baton Rouge Parish occupied by Appearer's father, under terms whereby substantially all of the proceeds of sale went to satisfy the Fidelity National Bank, and NONE went to satisfy either the trade creditors or other financial entities.

9. That both of the sales referred to in Paragraphs "7" and "8" above, were subject to first mortgage holders other than the Fidelity National Bank. These were paid with the first proceeds of sale, according to their rank.

10. That when Appearer and his wife purchased the

third parcel, namely, the parcel in Livingston Parish, your Appearer was not then in position to demand cancellation of the bank's Mortgage pertaining thereto, because of the fear that foreclosure on the parcel occupied by Appearer's father might kill him.

11. Nevertheless, Appearer believed that the bank would act in good faith and ultimately cancel same, as soon as the remaining parcels in East Baton Rouge Parish were sold.

12. In spite of the fact that the Fidelity National Bank ultimately obtained from King Lumber Industries, Inc., the good and valuable Mortgage Notes of a third party (having an actual cash value of $120,000.00) which Appearer and his wife had transferred to King Lumber Industries, Inc., as part of the sale consideration or price on the Livingston Parish property, THE FIDELITY NATIONAL BANK FAILED OR REFUSED TO RELEASE THE LIVINGSTON PARISH PROPERTY FROM THE COLLATERAL MORTGAGE, irrespective of the fact that the bank released the other two (2) properties from this same mortgage.

13. The parcel occupied by Appearer's father as a home was sold on February 12, 1981. Appearer did not solicit any condition to this sale, but did receive an understanding from the purchaser that Appearer's father would be permitted to remain therein for an indefinite term of a few months. APPEARER'S FATHER DIED IN AUGUST OF THE SAME YEAR!

14. Appearer specifically alleges that the failure or refusal of the bank to afford equality of treatment to Appearer and his wife, that is, the failure or refusal to release the Collateral Mortgage on property which Appearer and his wife purchased from King Lumber Industries, Inc., while granting said release to the other properties, constitutes brutal and inequitable treatment of Appearer and his wife.

15. That the Fidelity National Bank knows and knew full well, that the sole and only reason whereby Appearer affixed his signature to the three (3) Notes of King Lumber Industries, Inc., attached to the bank's Affidavit, in addition to his signature as President of King Lumber Industries, Inc., was on account of concern for Appearer's father—which concern caused Appearer to be at the mercy of the said bank.

COUNT VIII

ON THE ALLEGATIONS OF SHIRLEY G. KING

1. Appearer SHIRLEY G. KING is without knowledge relative to the allegations made in COUNTS I through VII herein, and thus responds solely and only to matters within her own knowledge and information.

2. Appearer believes she has been VICTIMIZED.

3. Appearer was never an officer, agent, employee, or Member of the Board of Directors of King Lumber Industries, Inc., and thus never took part in its affairs.

4. Appearer has no recollection whatever of ever signing documents held either by Fidelity National Bank or petitioners in intervention. NOR WAS APPEARER EVER REQUESTED TO DO SO! Thus, Appearer at no time took part in any discussions or negotiations leading up to the signing of such documents.

5. Appearer was asked by her husband to appear at a law office in the Fidelity National Bank Building, relative to the purchase by Appearer and her husband, of the Livingston Parish property, from King Lumber Industries, Inc. She did so.

6. Appearer understands that as a result of this sale, she obligated herself 1) on the assumption of a first mortgage on the Livingston Parish property to CITIZENS SAVINGS AND LOAN ASSOCIATION of Baton Rouge Louisiana, and 2) on a Note to King Lumber Industries, Inc. in the amount of $50,000.00, which Appearer understands has now been reduced to approximately

$42,500.00. These particulars appear in the Act of Sale which is part of this record.

7. At this appearance, Appearer was at no time apprised of the fact that there was a Collateral Mortgage held by the Fidelity National Bank, on the property being purchased. SUCH FACT WAS MENTIONED NEITHER IN THE ACT OF SALE, NOR IN ANY DOCUMENT SHOWN TO APPEARER AT THE TIME OF SALE, NOR IN ANY DISCUSSION HELD AT THE TIME OF SALE.

8. That Appearer and her husband were the owners of good and valuable Mortgage Notes of a third party in the total amount of $120,00.00—which Notes were used in part payment of the purchase price on the Livingston Parish property.

9. THAT APPEARER WOULD HAVE NEVER TRANSFERRED THESE NOTES AWAY AS PART OF THE PURCHASE PRICE, AND APPEARER WOULD HAVE NEVER OBLIGATED HERSELF ON AN ADDITIONAL $50,000.00 NOTE, IF APPEARER HAD BEEN MADE AWARE OF THE COLLATERAL MORTGAGE HELD BY THE BANK, ON THE PROPERTY BEING PURCHASED.

10. That Appearer seeks protection of all of her rights, as afforded her under both Federal and State law—especially Articles 2325 through 2369 of the Louisiana Civil Code.

COUNT IX

ON THE ALLEGATIONS OF G. HAROLD KING, JR. AND SHIRLEY G. KING

1. That the conduct and actions on the part of the Fidelity National Bank warrant this Court subordinating all of the claim of the Fidelity National Bank, and all of their security (including the transfer of any lien to this Estate) to the rights of 1) the trade creditors of King Lumber Industries, Inc. and 2) the creditors of this Estate excluding

the Fidelity National Bank—all in accordance with Sec. 510(c) of the Bankruptcy Code.

COUNT X
ON THE ALLEGATIONS OF HAROLD KING, JR. AND SHIRLEY G. KING

1. That the failure or refusal of the Fidelity National Bank to release the mortgage on the Livingston Parish property purchased by your Appearers, and the bank's other conduct, have caused such mental anguish to Appearers, and have caused them to undergo such hardship in paying just bills, that your Appearers are entitled to a claim against the Fidelity National Bank of Baton Rouge, in the amount of $300,000.00, under RULE 112 of the Rules of Bankruptcy Procedure, and other provisions of law.

COUNT XI
ON THE ALLEGATIONS OF G. HAROLD KING, JR. AND SHIRLEY G. KING

1. That appearers G. HAROLD KING, JR. and SHIRLEY G. KING have the absolute right to a Jury Trial of all issues so triable, and have the further right (under Interim Rule 9001 and RULE 115 of the Rules of Bankruptcy Procedure) that a District Judge conduct such trial by jury by placing this action on the calendar of the District Court as a Jury Action.

2. That Appearers G. HAROLD KING, JR. and SHIRLEY G. KING seek protecton of all of their rights, under the Constitution and laws of the United States, including Interim Rule 9001 and RULE 115 of the Rules of Bankruptcy Procedure, and accordingly, herewith request and pray for

A) TRIAL BY JURY, and
B) TRIAL BY JURY AS A JURY ACTION, before a
C) UNITED STATES DISTRICT COURT, and
D) UNITED STATES DISTRICT JUDGE.

PRAYER

WHEREFORE G.HAROLD KING, JR. and SHIRLEY G. KING pray for Trial by Jury, and Trial by Jury as a Jury Action, before a United States District Court, and United States District Judge, of all issues so triable, to the ultimate extent authorized by Interim Rule 9001 and RULE 115 of the Rules of Bankruptcy Procedure, and the Constitution and Laws of the United States.

1. That not by way of limitation, but only by way of illustration, that said Trial by Jury consider the issues:

a) Whether the Fidelity National Bank properly evaluated its security, so as to allege itself to be an unsecured creditor.

b) Whether the Fidelity National Bank, was in fact, the holder of unsecured claims in the amount of $64,000.00 more or less.

c) Whether the Fidelity National Bank was, in fact, the holder of any unsecured claim at least $5,000.00 more than the value of any lien on the property of Defendants, as required by Sec. 303(b) of the Bankruptcy Code.

d) Whether the Fidelity National Bank filed its petition in good or bad faith.

e) Whether the Fidelity National Bank discriminated against Defendants, by failing or refusing to cancel the Collateral Mortgage held by the bank, over the property of the Defendant, while retaining $120,000.00 of Mortgage Notes formerly owned by Defendants.

f) Whether the Defendants are generally paying their undisputed debts.

g) Whether the Defendants have been severely handicapped in paying undisputed debts, on account of the failure or refusal by the Fidelity National Bank, to treat Defendants according to the same criterion of release of mortgage, which the bank afforded to others.

2. That all security held by the Fidelity National Bank be deemed subordinated to the claims and rights of all other

creditors of Defendants, including the trade creditors of King Lumber Industries, Inc., in accordance with Sec. 510(c) of the Bankruptcy Code.

3. That Defendants recover by way of offset or in order to defeat this action, a sum not in excess of $300,000.00 from Fidelity National Bank, on condition that whatever sum is recovered is made available for all of the other creditors of Defendants, and the trade creditors of King Lumber Industries, Inc.

4. THAT THERE BE A SPECIAL FINDING BY THE JURY ON WHETHER G. HAROLD KING, JR. WAS UNDULY PRESSURED BY THE FIDELITY NATIONAL BANK, IN REFERENCE TO a) THE COLLATERAL MORTGAGE, AND b) THE NOTES OF KING LUMBER INDUSTRIES, INC., IN THE PLACEMENT OF HIS SIGNATURE THEREON.

5. That there be a special finding by the Jury on whether the Collateral Mortgage held by the Fidelity National Bank, and the signature of Defendant G. Harold King, Jr., were the result of an impermissible strategy on the part of the Fidelity National Bank, to gain a favored or preferential treatment on the bank's alleged claims, over the claims of other creditors of Defendants, and the trade creditors of King Lumber Industries, Inc.

6. That there be a special finding by the Jury on whether the Defendant G. Shirley King ever obligated herself on any obligation alleged herein, and

7. THAT THERE BE A SPECIAL FINDING BY THE JURY ON WHETHER ANY ALLEGED DEBT HEREIN IS A DEBT OF THE LEGAL COMMUNITY EXISTING BETWEEN G. HAROLD KING, JR., AND SHIRLEY G. KING, UNDER LOUISIANA LAW.

8. That after all due proceedings had, that the petition and intervening petitions be dismissed herein, without prejudice to these parties of asserting before proper tribunals, their alleged claims and/or claims of lien.

9. AND FOR ALL OTHER RELIEF NECESSARY.

Respectfully submitted
BY ATTORNEY

FRANZ JOSEPH BADDOCK
P.O. Box 3573
Baton Rouge, Louisiana 70821
(Tel.: (504) 343-9194)

ANNEXED:
Affidavits

CERTIFICATE

I certify that I have this date, by prepaid mail, forwarded copies of the foregoing to Mr. David Rubin, Esq., P.O. Box 2997, Baton Rouge, Louisiana 70821 (counsel for the Fidelity National Bank) and to Mr. Frederick R. Tulley, Esq., P.O. Box 2471, Baton Rouge, Louisiana 70821 (counsel for intervenors). BATON ROUGE, Louisiana, this 11th day of September, 1981.

/s/ Franz Joseph Baddock
FRANZ JOSEPH BADDOCK

AFFIDAVIT

STATE OF LOUISIANA
PARISH OF EAST BATON ROUGE

BEFORE ME, the undersigned authority, personally appeared

G. HAROLD KING, JR.

who, being first duly sworn, did depose that the factual information contained in COUNTS I through VII was given by him to his counsel, and that he has read these allegations and affirms that they are true and correct, to the best of his knowledge, information, and belief.

SIGNED /s/ G. Harold King, Jr.
G. HAROLD KING, JR.

SWORN AND SUBSCRIBED TO, Before Me, at Baton Rouge, Louisiana, on this the 11th day of September, 1981.

/s/ Franz Joseph Baddock

Franz Joseph Baddock
NOTARY PUBLIC

AFFIDAVIT

STATE OF LOUISIANA
PARISH OF EAST BATON ROUGE

BEFORE ME, the undersigned authority, personally appeared

SHIRLEY G. KING

who, being first duly sworn, did depose that the factual information contained in COUNT VIII was given by her to her counsel, and that she has read these allegations and affirms that they are true and correct, to the best of her knowledge, information, and belief.

SIGNED /s/ Shirley G. King

SHIRLEY G. KING

SWORN AND SUBSCRIBED TO, Before Me, at Baton Rouge, Louisiana, on this the 11th day of September, 1981.

/s/ Franz Joseph Baddock

Franz Joseph Baddock
NOTARY PUBLIC

G. Harold KING, Jr., and Shirley G. King, Plaintiffs-Appellants,

v.

FIDELITY NATIONAL BANK OF BATON ROUGE, Capital Investment Inc. and Louisiana Equity Capital Co., Defendants-Appellees.

No. 82-3379.

United States Court of Appeals, Fifth Circuit.

Aug. 15, 1983

Appeal was taken from a judgment of the United States District Court for the Middle District of Louisiana, John V. Parker, Chief Judge, affirming various rulings of the bankruptcy court. The Court of Appeals held that: (1) it was error to join debtor's wife in involuntary petition, and appropriate relief was her dismissal; (2) debtors made no argument precluding award of sanctions for their failure to appear at scheduled examination; (3) fact that debtor had sued both intervening creditors in state court before bankruptcy proceedings began did not prevent their intervention; and (4) even assuming that debtors had right to have question of appropriateness of bankruptcy court's entry of order for relief on bank's motion for summary judgment determined by an Article III court, such a determination had been made.

Affirmed in part, vacated and remanded in part.

1. Bankruptcy Key 67, 92

Bankruptcy Code makes no provision for joint involuntary cases, and therefore it was error to join debtor's wife in involuntary petition, warranting her dismissal.

Fed.Rules Civ.Proc. Rule 21, 28 U.S.C.A.; Bankr.Code, 11 U.S.C.A. §§ 302(a), 303.

2. Federal Civil Procedure Key 1451

Even if a subpoena were not a court order, discovery sanction was still available, under Federal rules of Civil Procedure governing, inter alia, failure of party to respond to request for inspection, relative to debtors' failure to appear at examination. Interim Rules Bankr.Proc.Rule 1008, 11 U.S.C.A.; Rules Bankr.Proc.Rule 205, 11 U.S.C.A.; Fed.Rules Civ.Proc.Rule 37(d), 28 U.S.C.A.

3. Bankruptcy Key 233

Where not granted before scheduled deposition, motion to set aside subpoena was ineffective to excuse debtors from compliance with subpoena.

4. Federal Civil Procedure Key 1353

Since time for deposition had passed, it was too late to attack validity of subpoena.

5. Bankruptcy Key 299

Fact that debtor had sued both intervening creditors in state court before bankruptcy proceedings began did not prevent their intervention, because there was absolutely no evidence of bad faith, and because intervention could not have had complained of effect of either preventing trial of state-court suits or having suits managed by interim trustee instead of by debtor. Bankr.Code, 11 U.S.C.A. §§ 524(a)(2), 727(b).

6. Jury Key 31(7)

Debtors were not unconstitutionally denied their right to trial by jury by granting of bank's motion for summary

judgment in involuntary bankruptcy proceeding.

7. Federal Civil Procedure Key 2547

Assuming that debtors had right to have Article III court determine question of their objections to bankruptcy court's entry of order for relief on bank's motion for summary judgment in involuntary bankruptcy proceeding, they had such determination, because both district court and Court of Appeals were Article III courts, applying same summary judgment standard as bankruptcy court. Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.; U.S.C.A. Const.Art. 3, § 1 et seq.

Franz J. Baddock, Baton Rouge, La., for plantiffs-appellants.

Kantrow, Spaht, Weaver & Walter, David S. Rubin, Lee C. Kantrow, Baton Rouge, La., for defendants-appellees.

Frederick R. Tulley, Louis M. Phillips, Baton Rouge, La., for La. Equity Capital Co. and Capital Investment.

Appeal from the United States District Court for the Middle District of Louisiana.

Before GARZA, RANDALL and GARWOOD, Circuit Judges.

PER CURIAM:

This case involves appeals from the district court's affirmance of various rulings of the bankruptcy court. For the reasons set forth below, we affirm in part and vacate and remand in part.

I. FACTUAL AND PROCEDURAL BACKGROUND.

On July 24, 1981, appellee Fidelity National Bank filed a joint involuntary chapter 7 bankruptcy petition against the appellants, G. Harold and Shirley G. King. *See* 11

U.S.C. § 303(b)(2) (Supp. V 1981). After the Kings filed a motion for a more definite statement and motions to dismiss for failure to state a claim on which relief could be granted and lack of personal jurisdiction, the bank gave notice that it intended to examine the Kings about their financial affairs. *See* Interim Bankr.R. 1008;[1] Bankr.R. 205. On August 7, 1981, Subpoenas were served on the Kings to compel their appearance for the examination on August 14. The day before the scheduled examination, the Kings filed a motion "to set aside" the notice and subpoena. On the advice of counsel, they did not attend the examination. The bank moved for sanctions for nonappearance. The bankruptcy court held a hearing and ordered the Kings' attorney to pay the bank $250 to reimburse it for the costs it had incurred in connection with the examination.

In the meantime, Capital Investments, Inc. and Louisiana Equity Capital Corporation moved to intervene as creditors in the involuntary proceeding. The Kings opposed the interventions, but after a hearing the bankruptcy court permitted them.[2]

Fidelity National Bank and the Kings each moved for summary judgment on the propriety of an order for relief. The bankruptcy court denied the Kings' motions and granted the bank's.

The Kings appealed to the district court on a variety of grounds, of which the only ones pertinent to this appeal

[1]The Interim Bankruptcy Rules have been adopted by the bankruptcy courts of the Middle District of Louisiana.

[2]Capital Investments, Inc. and Louisiana Equity Capital Corp. are listed as appellees in the record, but neither company has filed a brief or otherwise appeared in this appeal.

are:[3] that Shirley King was not a proper party to the involuntary bankruptcy; that discovery sanctions should not have been imposed on their counsel; that the

[3]The Kings included a variety of other questions in their notices of appeal to this court, but these questions were not addressed in their briefs and are thus waived.

interventions should have been denied; that summary judgment was improperly granted; and that the Kings had been improperly denied their rights to a jury trial and to a decision by an article III court on the question of the appropriateness of the order for relief. The district court affirmed the bankruptcy court in full; the Kings raise the same contentions here. We address each argument in turn.

II. INCLUSION OF SHIRLEY KING.

The bank filed its petition for involuntary bankruptcy because it held several notes guaranteed by Harold King that were in default. Shirley King was joined in the petition merely because she was Harold King's wife and his obligations were presumptively those of the marital community. The Kings have strenuously objected to her inclusion in the proceedings.

[1] It was error to join Shirley King in the involuntary petition, for the Bankruptcy Code makes no provision for joint involuntary cases. *Compare* 11 U.S.C. § 302(a) (Supp. V 1981) ("A joint case...is commenced by the filing...of a single petition...*by an individual that may be a debtor...and such individual's spouse.*") (emphasis added), *with id.* § 303 (making no mention of joint cases and referring throughout to "the debtor" in the singular); *see also* S.Rep. No. 989, 95th Cong., 2d Sess. 32 (1978), *reprinted in* 1978 U.S. Code Cong. & Ad.News 5787, 5818 ("A joint case is a *voluntary bankruptcy case* concerning a wife and husband.")

(emphasis added); H.R.Rep. No. 595, 95th Cong., 1st Sess. 321 (1977), *reprinted in* 1978 U.S.Code Cong. & Ad.News 5963, 6277 (same); 2 L. King, *Collier on Bankruptcy* ¶303.07[a] (15th ed. 1979) ("A joint involuntary case may not be filed against a debtor and spouse.").

The question now is what remedy we should select for this error. The usual remedy for misjoinder is either to drop the misjoined party or to sever the claims. *See* Fed.R.Civ.P. 21; 7 C. Wright & A. Miller, *Federal Practice & Procedure* § 1684 (1972). Federal Rule of Civil Procedure 21 is not, however, directly applicable here. *See* Bankr.R. 721 (Fed.R.Civ.P. 21 applicable in adversary proceedings in bankruptcy); Bankr.R. 121 (listing adversary proceeding rules applicable to contested petitions; Bankr.R. 721 not listed). *Collier's,* however, recommends that Bankruptcy Rule 721, and thus Federal rule of Civil Procedure 21, should be applied to cases of joinder of parties other than the debtor as defendants in an involuntary petition. 2 L. King, *Collier on Bankruptcy* ¶303.15[10] (15th ed. 1979). We think that that is the most sensible way to deal with a situation that is not dealt with in the rules simply because it ought never to arise.

Under Federal Rule of Civil Procedure 21, we believe that the preferable course is to dismiss Shirley King from these proceedings.[4] Her inclusion is not harmless error, because she has been adjudicated a bankrupt and any separate property she may own has been included in the estate.[5] *See* 11 U.S.C. §§ 727(a)(8), 1141(d)(3)(C) (Supp. V

[4]It is undisputed that Harold King, as guarantor of the notes on which the bank's claims are based, is a proper party to this case, although he contests the propriety of the order for relief.

[5]The bank has made an uncontradicted assertion that Shirley King had no separate property when the petition was filed, but that does not affirmatively appear from the record and would in any event not change our result.

1981) (discharge under chapters 7 or 11 not available to person who received chapter 7 discharge in case filed less than six years before current petition); *id.* § 541(a) (property of the estate). The creditors will not be prejudiced by Shirley King's dismissal; all have asserted claims against her only by virtue of her membership in the marital community; and Harold King's inclusion in the petition brings all of the community property into the bankruptcy estate. 11 U.S.C. § 541(a)(2)(A) (Supp. V. 1981) (estate includes all community property under the sole or joint management of the debtor); La.Civ.Code Ann. art. 2346 (West Supp. 1983) (with limited exceptions not relevant here, each spouse has full management power over community property). There

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is thus no reason simply to sever the case against Shirley King, and indeed it might be impossible to do so at this stage of the proceedings. We therefore vacate that portion of the district court's judgment affirming the entry of an order for relief against Shirley King and remand the case to the district court for entry of an order directing the bankruptcy court to vacate the order for relief against Shirley King and to dismiss the petition against her.

III. DISCOVERY SANCTIONS.

Federal Rule of Civil Procedure 37 applies to a Bankruptcy Rule 205 examination in a case involving a contested petition. Bankr.R. 121 (Bankr.R. 737 applicable in cases involving contested petitions); Bankr.R. 737 (Fed.R.Civ.P. 37 applies to adversary proceedings). This does not appear to have been changed by Interim Bankruptcy Rule 1008 (providing for an additional discovery procedure with sanctions for failure to comply "including those specified in" Fed.R.Cov.P. 37(b)(2)(A),

(B), and (C); rule 1008 expressly leaves the procedures under Bankruptcy Rules 121 and 205 intact.

[2] Federal Rule of Civil Procedure 37 provides for the sanctions levied here (expenses caused by failure to appear at a deposition) under two sets of circumstances; when the failure is in disobedience of a court order, Fed.R.Civ.P. 37(b), and when there is no court order but the opposing party gave notice of the deposition, Fed.R.Civ.P. 37(d). The Kings' defense against the sanctions is based in part on the theory that a subpoena is not a court order.[6] Not surprisingly, they cite no authority for this novel proposition.[7] Even if a subpoena were not a court order (which is not the case), the sanction here would still have been available under rule 37(d).

[3, 4] The Kings raise two other defenses for their failure to appear: that the subpoena was defective, and that they made a timely motion to set it aside. Neither defense is adequate here. The motion to set aside the subpoena was arguably technically flawed, but the greater error in the Kings' analysis is that a motion to quash must be not only made but *granted* before the scheduled deposition to excuse compliance. *See United States v. Portland Cement Co.*, 338 F.2d 798, 803 (10th Cir. 1964) (under earlier version of rules, order conditioning discovery must be obtained, if at all, before discovery takes place); *Pioche Mines Consolidated, Inc. v. Dolman*, 333 F.2d 257, 269 (9th Cir. 1964), *cert. denied*, 380 U.S. 956, 85 S.Ct. 1082, 13 L.Ed.2d

[6]They do not actually argue that a subpoena is not a court order for purposes of rule 37, but rather that it is not a court order for purposes of Bankruptcy Rule 205(a) ("the court may order" examination). The argument is equally specious in both contexts.

[7]This argument is unfortunately characteristic of the Kings' briefs, which are noteworthy both for their excessive use of emotional overstatement, capital letters, underscoring, and exclamation points, and for their dearth of legal analysis and citation to apposite authority.

972 (1965) under earlier version of rules, motion to quash notice of deposition must be not only filed but acted on before scheduled time of deposition to avoid sanctions). The motion to set aside the subpoena was thus ineffective to excuse the Kings from compliance with the subpoena. Further, since the time for the deposition has passed, it is too late to attack the validity of the subpoena.[8] *See Pioche, supra.*

[8]The attacks on the subpoena are in any event meritless. The first is that it was not the court order required under Bankruptcy Rule 205(a) to compel an examination; *see* note 6 and accompanying text, *supra*, for a discussion of this claim. The next contention is that it was improper to order an examination while motions to dismiss the case were pending. There is no requirement that depositions await disposition of all motions to dismiss the case. *Se* Bankr.R. 121 (applying Bankr.R. 730 to proceedings on contested petitions); Bankr.R. 730 (adopting Fed.R.Civ.P. 30 with changes to conform to adversary proceedings in bankruptcy); Fed.R.Civ.P. 30(a) (no requirement that motions to dismiss be disposed of before depositions taken). Indeed, such a requirement would permit any party to delay discovery indefinitely without a valid reason.

Finally, the Kings allege that it was improper to order their examinations before they filed their answer. This argument is based on Interim Bankruptcy Rule 1008, which provides for examination in court of a debtor who "denies" the allegation that he is not generally paying his debts as they come due. The Kings claim that such a denial can only be made in the debtor's answer. The Kings, however, totally overlook the fact that this examination was ordered not under Interim Rule 1008, but under Bankruptcy Rule 205, which Interim Rule 1008 expressly left undisturbed and which contains no requirement that the debtor have denied anything. This contention thus also fails.

The Kings have thus made no argument that precludes the award of sanctions here. The $250 charge assessed seems quite reasonable, as does its assessment against the attorney who advised the Kings to disobey the subpoena rather than

against the Kings themselves. Federal Rule of Civil Procedure 37 expressly authorizes such sanctions against attorneys. We therefore affirm the district court's affirmance of the award here.

IV. INTERVENTIONS.

[5] Harold King had sued both Capital Investment, Inc. and Lousiana Equity Capital Corporation in state court before the bankruptcy proceedings began. He objects to their intervention in this case because he claims they were merely engaging in a bad-faith effort either to prevent trial of his state-court suits or to have the suits managed by the interim trustee instead of by him. These contentions are frivolous. There is absolutely no evidence of bad faith, nor could the intervention have had either of the complained-of effects.[9] Indeed, had the intervenors chosen not to participate in the bankruptcy proceedings, King would have been able to plead a discharge received in these proceedings as an absolute defense to their counterclaims in the state-court suits. 11 U.S.C. §§ 727(b), 524(a)(2) (Supp. V. 1981). We affirm the district court's affirmance of the grants of intervention.

V. SUMMARY JUDGMENT

The Kings have two basic objections to the bankruptcy court's entry of the order for relief on the bank's motion for summary judgment. The first is a wholly unsupportable

[9]It is unclear whether the allegations about preventing a trial are based on the automatic stay, 11 U.S.C. § 362 (a) (Supp. V. 1981), or on the Kings' violent dislike of summary judgment procedures, discussed in part V, *infra*. The automatic stay would apply, if at all, without regard to the defendants' status as intervenors in the bankruptcy, and summary judgment procedures are available in both state court and bankruptcy court. Similarly, the trustee's right to prosecute the suit arises from the fact that Harold King's cause of action became property of the estate, 11 U.S.C. §§ 541(a), 323 (Supp. V 1981), and not from the defendants' applications for intervention.

constitutional argument: that they were unconstitutionally denied their right to trial by jury and to determination of the issue by an article III court.

[6] Assuming that the Kings had a right to jury trial on the question, it was not denied here. Summary judgment is not unconstitutional; where there are no disputed issues of material fact for a jury to decide, no jury is necessary. Indeed, the Kings' own motions for summary judgment on the issue indicate both a belief that a jury was not necessary and a desire to have the court decide whether an order for relief was appropriate.

[7] Similarly, assuming that the Kings had a right to have this question determined by an article III court, they have had such a determination. Both the district court and this court are article III courts, and we both apply the same summary judgment standard as the bankruptcy court: summary judgment is appropriate only where, viewing the facts in the light most favorable to the nonmovant, there are no genuine issues of material fact and judgment for the movant is appropriate as a matter of law. Fed.R.Civ.P. 56(c). The Kings make a half-hearted allegation that neither the bankruptcy court nor the district court found that summary judgment was proper and that it was in fact improper. The lower courts clearly thought that summary judgment was warranted or they would not have granted it. The Kings do not point to any alleged issue of material fact—they allege many fact questions, but none is material to the narrow issue of entry of an order of relief—and we find none in the record. We therefore affirm the district court's affirmance of the entry of the order of relief on

motion for summary judgment, although of course only as to Harold King. *See* part II, *supra*.

VI. CONCLUSION.

We find that all of the Kings' contentions are without merit, except for the argument that Shirley King was not a proper party to the involuntary proceedings. We therefore affirm the judgment of the district court in all respects other than its affirmance of the bankruptcy court's entry of the order for relief against Shirley King; we vacate the affirmance of that order and remand with instructions to direct the bankruptcy court to vacate the order for relief against Shirley King and dismiss the petition against her.

AFFIRMED IN PART, VACATED AND REMANDED IN PART.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 82-3379

U.S. COURT OF APPEALS
FILED
Oct. 11, 1983
GILBERT F. GANUCHEAU
CLERK

G. HAROLD KING, JR. and
SHIRLEY G. KING,
Plaintiffs-Appellants,

versus

FIDELITY NATIONAL BANK OF BATON ROUGE,
CAPITAL INVESTMENT INC. and
LOUISIANA EQUITY CAPITAL CO.,
Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Louisiana

ON PETITIONS FOR REHEARING
(October 11, 1983)

Before GARZA, RANDALL and GARWOOD, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petitions for rehearing filed in the above entitled and numbered cause be and the same are hereby denied.

ENTERED FOR THE COURT:
CAROLYN DINEEN RANDALL

United States Circuit Judge

CLERK'S NOTE:
SEE FRAP AND LOCAL
RULES 41 FOR STAY OF THE
MANDATE.
REHG-5

NOMINATIONS OF GEORGE H. KING, JR., AND KARL BRANDT

HEARING
before the
COMMITTEE ON BANKING AND CURRENCY
UNITED STATES SENATE
Eighty-Sixth Congress
First Session
on
The Nominations of George H. King, Jr., to be a member of the Board of Governors of the Federal Reserve System; and Karl Brandt to be a Member of the Council of Economic Advisers

MARCH 11, 1959

Printed for the use of the Committee on Banking and Currency

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CERTIFICATE OF SERVICE

I certify under Rule 28.5, that I have this date, by prepaid mail, forwarded three (3) copies of the foregoing Appendix to MR. DAVID S. RUBIN, Attorney, P.O. Box 2997, Baton Rouge, Louisiana 70821, who is counsel for the FIDELITY NATIONAL BANK OF BATON ROUGE.

I further certify (in accordance with 712 F.2d 188, 189 Note 2), that since neither Capital Investments, Inc. nor Louisiana Equity Capital Corp. filed any brief or otherwise appeared in the appeal before the United States Court of Appeals for the fifth Circuit, that no service was necessary on these entities under Rule 28.5, and that all parties required to be served have been served under the said Rule 28.5.

Nevertheless, to apprise all entities that may have interest in this matter, I further certify that I have served an information copy of the same Appendix on Mr. FREDERICK R. TULLEY, Attorney, P.O. Box 2471, Baton Rouge, Louisiana 7821, Mr. CHARLES N. MALONE, Attorney, P.O. Box 3233, Baton Rouge, Louisiana 70821, and Mr. MICHAEL T. PERRY, Attorney, 5420 Corporate Blvd., Suite 302, Baton Rouge, Louisiana 70808.

BATON ROUGE, Louisiana, this January 5th, 1984.

/s/ FRANZ JOSEPH BADDOCK